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THE HONORABLE EDWARD F. SHEA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

CHARLES SCHMIDT,

Plaintiff,

v.

SKINNYCORP, LLC,

Defendant.

2:11-cv-00236-EFS

ANSWER AND DEFENSES TO
AMENDED COMPLAINT FOR
COPYRIGHT INFRINGEMENT;
TRADEMARK INFRINGEMENT;
VIOLATION OF THE LANHAM ACT;
VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT; AN
ACCOUNTING; DECLARATORY
JUDGMENT; AND
COUNTERCLAIMS

DEMAND FOR JURY TRIAL

ANSWER

Defendant skinnyCorp., LLC (“skinnyCorp”), by its undersigned attorneys,
answers the Amended Complaint of Plaintiff Charles Schmidt (“Schmidt” or
“Plaintiff”) as set forth below. The Answer’s paragraphs are numbered to
correspond to the numbered paragraphs of the Amended Complaint. Except as

ANSWER TO AMENDED COMPLAINT and
COUNTERCLAIMS

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1 expressly admitted below, skinnyCorp denies the allegations and characterizations
2 in the Amended Complaint.

3
4 1. skinnyCorp is without knowledge or information sufficient to form a
5 belief as to the truth or falsity of the allegations contained in Paragraph 1 of the
6 Amended Complaint and therefore denies the same.

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8 2. skinnyCorp admits that it is the parent company of Threadless
9 Chicago, LLC and has a principal office located in Chicago, Illinois. skinnyCorp
10 admits that Threadless Chicago, LLC owns and operates a retail store called
11 Threadless that is located in Chicago, Illinois. skinnyCorp admits that it does
12 business as Threadless and operates an interactive website located at
13 threadless.com on which it advertises, promotes, and sells apparel for men,
14 women, and children, and other merchandise throughout the United States and the
15 world, including the Eastern District of Washington. skinnyCorp admits that the
16 Threadless retail store advertises, promotes, and sells some of the same
17 merchandise offered for sale on the threadless.com website. skinnyCorp otherwise
18 denies the remaining allegations of Paragraph 2 of the Amended Complaint.
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24 ANSWER TO AMENDED COMPLAINT AND
25 COUNTERCLAIMS

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1 of Paragraph 6 of the Amended Complaint and therefore denies the same.

2 skinnyCorp denies the remaining allegations contained in Paragraph 6 of the
3 Amended Complaint.
4

5 7. skinnyCorp denies the allegations contained in Paragraph 7 of the
6 Amended Complaint.
7

8 8. skinnyCorp admits that subject matter jurisdiction of Plaintiff's
9 Lanham Act claim is based on 15 U.S.C. § 1121(a), but denies that there is a basis
10 for such claim.
11

12 9. skinnyCorp admits that jurisdiction of Plaintiff's state law claim is
13 based on 28 U.S.C. § 1367(a), but denies that there is a basis for such claim.
14

15 10. skinnyCorp denies that it has sold infringing items that are the subject
16 of this action in Washington or elsewhere, but otherwise admits the remaining
17 allegations contained in Paragraph 10 of the Amended Complaint.
18

19 11. skinnyCorp admits that venue in this judicial district is based on 28
20 U.S.C. § 1391(a) and (c), and that it has transacted business in this District.

21 skinnyCorp is without knowledge or information to sufficient form a belief as to
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24 ANSWER TO AMENDED COMPLAINT AND
25 COUNTERCLAIMS
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1 the truth or falsity of the remaining allegations contained in Paragraph 11 of the
2 Amended Complaint and therefore denies the same.
3

4 12. skinnyCorp is without knowledge or information sufficient to form a
5 belief as to the truth or falsity of the allegations contained in Paragraph 12 of the
6 Amended Complaint and therefore denies the same. skinnyCorp denies that
7 Plaintiff titled his video "Keyboard Cat" at any time prior to 2009, but admits that
8 Plaintiff adopted the title "Keyboard Cat" after third parties adopted and used the
9 title "Keyboard Cat" to refer to an excerpt of Plaintiff's video that was used,
10 copied, displayed and/or distributed by third parties frequently on the Internet.
11

12 13. skinnyCorp is without knowledge or information sufficient to form a
13 belief as to the truth or falsity of the allegations contained in Paragraph 13 of the
14 Amended Complaint and therefore denies the same.
15

16 14. skinnyCorp denies that Plaintiff is the owner of the alleged mark
17 "Keyboard Cat." skinnyCorp is without knowledge or information sufficient to
18 form a belief as to the truth or falsity of the remaining allegations of Paragraph 14
19 of the Amended Complaint and therefore denies the same.
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1 copy of this e-mail is annexed hereto as Exhibit A. On July 23, 2009, a
2 representative of skinnyCorp replied to O'Farrell by e-mail explaining that the
3 company would not link to the tee-shirt sold on Hot Topic. *Id.* To skinnyCorp's
4 knowledge, O'Farrell did not reply to this e-mail. skinnyCorp is otherwise without
5 knowledge or information sufficient to form a belief as to the truth or falsity of the
6 allegations contained in Paragraph 24 of the Amended Complaint and therefore
7 denies the same.
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10 25. skinnyCorp is without knowledge or information sufficient to form a
11 belief as to the truth or falsity of the allegations contained in Paragraph 25 of the
12 Amended Complaint and therefore denies the same.
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14 26. skinnyCorp is without knowledge or information sufficient to form a
15 belief as to the truth or falsity of the allegations contained in Paragraph 26 of the
16 Amended Complaint and therefore denies the same.
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18 27. skinnyCorp is without knowledge or information sufficient to form a
19 belief as to the truth or falsity of the allegations contained in Paragraph 27 of the
20 Amended Complaint and therefore denies the same.
21

1 28. skinnyCorp admits that in or around July 2009, it began
2 manufacturing, distributing, advertising, promoting and offering for sale a tee-shirt
3 on the interactive website threadless.com referred to as “Three Keyboard Cat
4 Moon,” and admits that it initially did so without authorization or license from
5 Plaintiff, but denies that authorization or license from Plaintiff was necessary or
6 required at any time. skinnyCorp otherwise denies the remaining allegations
7 contained in Paragraph 28 of the Amended Complaint.
8

9
10 29. skinnyCorp admits that the tee-shirt it sold features a graphic created
11 by Shawn Harris and Emilee Seymour, which portrays three orange and white cats
12 wearing tee-shirts with the sleeves rolled up, in colors of purple, blue and yellow,
13 and that each cat is depicted with its front paws placed over and/or on a keyboard,
14 and the cats and pianos are set on top of a night time background of illustrated stars
15 and the moon. skinnyCorp admits that the inside of this tee-shirt features a screen
16 print tag that displays an image of a cat and the moon as well as the phrase, “Three
17 Keyboard Cat Moon,” among other text, including skinnyCorp’s THREADLESS
18 trademark and threadless.com website address. skinnyCorp admits that a copy of
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1 what purports to be screen shots of a webpage on Plaintiff's website and a picture
2 of the inside screen print label of the tee-shirt sold by skinnyCorp are attached to
3 the Amended Complaint as Exhibit C. skinnyCorp otherwise denies the remaining
4 allegations contained in Paragraph 29 of the Amended Complaint.
5

6 30. skinnyCorp admits that Shawn Harris and/or Emilee Seymour stated
7 as follows on their blog that is located on the threadless.com website: "An homage
8 to the two best things to spring from the loins of the www in some time. If you're
9 not familiar with Fatso (AKA Keyboard Cat) or amazon.com's bestseller '3 Wolf
10 Moon', I suggest a google search, and loosening your spam protection. We more
11 or less played painter-dj with these bad larrys, and pulled a mash-up a la visual
12 Danger Mouse" and "Oxen would like to thank the Mountain Men, Fatso and
13 Charlie Schmidt, Brad O'Farrell, threadless, and all of the people scoring,
14 commenting, and buying, for being part of this mad, mad group project with us."
15 skinnyCorp admits that this blog displays an image of a tee-shirt referred to as "3
16 Wolf Moon" and a still image of the asserted video that displays
17 "charlieschmidt.com" on the bottom right hand corner. skinnyCorp admits that
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1 third parties who commented on this blog stated their belief that the tee-shirt
2 referred to as “Three Keyboard Cat Moon” is a tribute to the keyboard cat and
3 another tee-shirt design known as “Three Wolf Moon.” skinnyCorp admits that a
4 copy of what purports to be screen shots of Shawn Harris and Emilee Seymour’s
5 blog and the Threadless user comments on the threadless.com website are attached
6 to the Amended Complaint as Exhibit D. skinnyCorp otherwise denies the
7 remaining allegations contained in Paragraph 30 of the Amended Complaint.
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9

10 31. skinnyCorp admits the allegations contained in the first three
11 sentences of Paragraph 31 of the Amended Complaint. skinnyCorp further admits
12 that a copy of what purports to be of screen shots from the threadless.com website
13 are attached to the Amended Complaint as Exhibit E.
14
15

16 32. skinnyCorp admits the allegations contained in the first sentence of
17 Paragraph 32 of the Amended Complaint. skinnyCorp admits that a copy of what
18 purports to be a print out of a *Chicago Tribune* article is attached to the Amended
19 Complaint as Exhibit F.
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1 33. skinnyCorp admits that, in or around May 2011, in conjunction with
2 Griffin Technology, skinnyCorp began manufacturing, distributing, advertising,
3 promoting and offering for sale an iPhone 4 case on the interactive website
4 threadless.com referred to as “Three Keyboard Cat Moon” that features the same
5 graphic as that portrayed on the tee-shirt referred to as “Three Keyboard Cat
6 Moon.” skinnyCorp denies that it began manufacturing, distributing, advertising,
7 promoting and offering for sale an iPhone 4 case on the interactive website
8 threadless.com that features the same graphic as that portrayed on the tee-shirt
9 referred to as “Three Keyboard Cat Moon” without authorization or license from
10 Plaintiff, and denies that authorization or license from Plaintiff was necessary or
11 required at any time. skinnyCorp admits that a copy of what purports to be screen
12 shots from the threadless.com website are attached to the Amended Complaint as
13 Exhibit G. skinnyCorp otherwise denies the remaining allegations contained in
14 Paragraph 33 of the Amended Complaint.
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20 34. skinnyCorp is without knowledge or information sufficient to form a
21 belief as to the truth or falsity of the allegations contained in Paragraph 34 of the
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1 Amended Complaint and therefore denies the same. skinnyCorp denies that
2 Plaintiff's endorsement, support, sponsorship, approval, or authorization was
3 necessary or required at any time.
4

5 35. skinnyCorp denies the allegations contained in Paragraph 35 of the
6 Amended Complaint. skinnyCorp further denies that Plaintiff's authorization or
7 license was necessary at any time.
8

9 36. skinnyCorp denies the allegations contained in Paragraph 36 of the
10 Amended Complaint. skinnyCorp further denies that Plaintiff's endorsement,
11 support, sponsorship, approval, or authorization was necessary or required at any
12 time.
13

14 37. skinnyCorp is without knowledge or information sufficient to form a
15 belief as to the truth or falsity of the allegations contained in Paragraph 37 of the
16 Amended Complaint and therefore denies the same.
17

18 38. skinnyCorp admits that it received notices from individuals purporting
19 to represent Plaintiff and that skinnyCorp contended that it is entitled to use a
20 video posted on YouTube titled "Cool Cat" because Plaintiff abandoned his
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22

1 copyright in such video. skinnyCorp admits that copies of what purport to be
2 letters and emails between such individuals purporting to represent Plaintiff and
3 skinnyCorp are attached to the Amended Complaint as Exhibit I, but denies that
4 Plaintiff has attached all such correspondence. skinnyCorp otherwise denies the
5 remaining allegations contained in Paragraph 38 of the Amended Complaint.
6
7

8 39. skinnyCorp denies that it is “aware that Plaintiff owns the copyright in
9 the Keyboard Cat Video and the trademark KEYBOARD CAT.” skinnyCorp
10 admits that it advertises, promotes, and/or offers for sale an iPhone case that
11 depicts the “Three Keyboard Cat Moon” design. skinnyCorp otherwise denies the
12 remaining allegations contained in Paragraph 39 of the Amended Complaint.
13
14

15 FIRST CLAIM FOR RELIEF
16 Copyright Infringement

17 40. skinnyCorp’s responsive pleadings to Paragraphs 1-39 of the
18 Amended Complaint are incorporated herein by reference.

19 41. skinnyCorp denies that Plaintiff is the owner of any copyrights in the
20 so-called “Keyboard Cat Video” and denies that Registration No. PA 1-696-099 is
21 valid. skinnyCorp is without knowledge or information sufficient to form a belief
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1 as to the truth or falsity of the remaining allegations contained in Paragraph 41 of
2 the Amended Complaint and therefore denies the same.

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4 42. skinnyCorp denies the allegations contained in Paragraph 42 of the
5 Amended Complaint.

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7 43. skinnyCorp denies the allegations contained in Paragraph 43 of the
8 Amended Complaint.

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10 44. skinnyCorp denies the allegations contained in Paragraph 44 of the
11 Amended Complaint.

12
13 45. skinnyCorp denies the allegations contained in Paragraph 45 of the
14 Amended Complaint.

15
16 46. skinnyCorp denies the allegations contained in Paragraph 46 of the
17 Amended Complaint.

18
19 47. skinnyCorp admits that the Plaintiff purports to seek remedies
20 pursuant to 17 U.S.C. §§ 504(b); 502; and 503, but denies that Plaintiff is entitled
21 to any remedy.

SECOND CLAIM FOR RELIEF
Trademark Infringement under the Lanham Act

48. skinnyCorp's responsive pleadings to Paragraphs 1-47 of the Amended Complaint are incorporated herein by reference.

49. skinnyCorp denies the allegations contained in first sentence of Paragraph 49 of the Amended Complaint. skinnyCorp is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 49 of the Amended Complaint and therefore denies the same.

50. skinnyCorp denies the allegations contained in Paragraph 50 of the Amended Complaint.

51. skinnyCorp denies the allegations contained in Paragraph 51 of the Amended Complaint.

52. skinnyCorp denies the allegations contained in Paragraph 52 of the Amended Complaint.

53. skinnyCorp denies the allegations contained in Paragraph 53 of the Amended Complaint.

THIRD CLAIM FOR RELIEF
Violation of the Lanham Act, 15 USC § 1125(a)

56. skinnyCorp denies the allegations contained in Paragraph 56 of the Amended Complaint.

57. skinnyCorp denies the allegations contained in Paragraph 57 of the Amended Complaint.

58. skinnyCorp denies the allegations contained in Paragraph 58 of the Amended Complaint.

FOURTH CLAIM FOR RELIEF
Violation of the Washington Consumer Protection Act

59. skinnyCorp's responsive pleadings to Paragraphs 1-58 of the Amended Complaint are incorporated herein by reference.

60. skinnyCorp denies the allegations contained in Paragraph 60 of the Amended Complaint.

61. skinnyCorp denies the allegations contained in Paragraph 61 of the Amended Complaint.

62. skinnyCorp denies the allegations contained in Paragraph 62 of the Amended Complaint.

63. skinnyCorp denies the allegations contained in Paragraph 63 of the Amended Complaint.

64. skinnyCorp denies the allegations contained in Paragraph 64 of the Amended Complaint.

65. skinnyCorp admits that the Plaintiff purports to claim entitlement to remedies, including injunctive relief, treble damages, interest, costs and reasonable attorneys' fees under the Washington Consumer Protection Act, RCW 19.86., but denies that Plaintiff is entitled to any remedy.

1 FIFTH CLAIM FOR RELIEF

2 Accounting

3 66. skinnyCorp's responsive pleadings to Paragraphs 1-65 of the
4 Amended Complaint are incorporated herein by reference.
5

6 67. skinnyCorp denies the allegations contained in Paragraph 67 of the
7 Amended Complaint.

8 68. skinnyCorp denies the allegations contained in Paragraph 68 of the
9 Amended Complaint.
10

11 69. skinnyCorp denies the allegations contained in Paragraph 69 of the
12 Amended Complaint, and specifically denies that Plaintiff is entitled to an
13 accounting.
14

15 SEVENTH CLAIM FOR RELIEF

16 Declaratory Judgment

17 70. skinnyCorp's responsive pleadings to Paragraphs 1-69 of the
18 Amended Complaint are incorporated herein by reference.
19

20 71. skinnyCorp admits that Plaintiff requests that this Court issue a
21 declaratory judgment pursuant to 28 U.S.C. § 2201, et seq.
22

72. skinnyCorp admits the allegations of Paragraph 72 of the Amended Complaint, but denies that Plaintiff did not surrender his copyright in the so-called “Keyboard Cat Video” and denies that Plaintiff did not have any intention to surrender his copyright in the so-called “Keyboard Cat Video.”

73. skinnyCorp is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 73 of the Amended Complaint as they pertain to Plaintiff and therefore denies the same. skinnyCorp admits the allegations in Paragraph 73 of the Amended Complaint as they pertain to skinnyCorp.

74. Paragraph 74 of the Amended Complaint proffers a legal conclusion and thereby does not call for a response, and/ or constitutes an allegation of a nature that does not call for a response. To the extent that the allegations in Paragraph 74 call for a response, skinnyCorp hereby denies them.

75. skinnyCorp admits that is necessary and proper for this Court to adjudicate and declare whether Plaintiff owns a valid subsisting copyright in the

1 so-called “Keyboard Cat Video.” skinnyCorp denies that Plaintiff owns a valid
2 subsisting copyright in the so-called “Keyboard Cat Video.”
3

4 76. skinnyCorp admits that Plaintiff requests relief pursuant to 28 U.S.C.
5 § 2201 et seq. but denies that Plaintiff is entitled to any relief.
6

7 **RESPONSE TO PRAYER FOR RELIEF**

8 In response to Plaintiff’s Prayer For Relief, skinnyCorp denies that Plaintiff
9 is entitled to any relief whatsoever and requests that the Court enter judgment in
10 skinnyCorp’s favor on all counts and award skinnyCorp its reasonable costs and
11 attorneys’ fees and any further relief as the Court may deem appropriate.
12

13 **SKINNYCORP’S DEFENSES**

14 **FIRST DEFENSE**

15
16 skinnyCorp has not infringed upon any rights of Plaintiff and Plaintiff has
17 not sustained any injury or damage as a result of any act or conduct by skinnyCorp.
18

19 **SECOND DEFENSE**

20 Plaintiff does not own trademark rights in the term “Keyboard Cat” because
21 the term is merely descriptive of any product or service showing a cat and a
22

1 keyboard, and the term “Keyboard Cat” has not acquired distinctiveness to
2 exclusively identify Plaintiff as the source of any product or service.
3

4 THIRD DEFENSE

5 Plaintiff does not own trademark rights in the term “Keyboard Cat” because
6 the term is generic of any product or service showing a cat playing a keyboard and
7 the term “Keyboard Cat” and has been used in a generic manner by Plaintiff and
8 third parties.
9

10 FOURTH DEFENSE

11
12 To the extent Plaintiff ever had any trademark rights in the term “Keyboard
13 Cat” Plaintiff has abandoned those rights as a result of widespread, unlicensed
14 and/or uncontrolled third-party use.
15

16 FIFTH DEFENSE

17 Plaintiff does not own the alleged mark “Keyboard Cat” because he is not
18 the exclusive user of the term “Keyboard Cat” in interstate commerce. Third
19 parties have long used the term “Keyboard Cat” in connection with videos, and
20 other goods and services and in fact, upon information and belief, such use began
21
22

1 before Plaintiff first adopted and began use of the term “Keyboard Cat.” The
2 alleged mark “Keyboard Cat” is not exclusively associated with Plaintiff or his
3 products and/or services.
4

5 SIXTH DEFENSE

6 There is no likelihood of confusion, and therefore, no valid claim for
7 trademark infringement or unfair competition.
8

9 SEVENTH DEFENSE

10 Plaintiff’s asserted trademark registration for the purported mark “Keyboard
11 Cat” is invalid because Plaintiff’s purported mark is not protectable, because
12 Plaintiff’s purported mark has been abandoned to the extent Plaintiff ever had
13 rights in the purported mark, and because Plaintiff committed fraud on the United
14 States Patent and Trademark Office by declaring to the United States Patent and
15 Trademark Office he was the only person who had the right to use the term
16 “Keyboard Cat” when he knew that was not true. *See* Paragraphs 78-96 of
17 skinnyCorp’s Counterclaims, which are incorporated here by reference.
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1 EIGHTH DEFENSE

2 skinnyCorp's challenged use of the term "Three Keyboard Cat Moon" is
3
4 use otherwise than as a trademark and used fairly and in good faith to describe the
5 products that are sold by skinnyCorp, which depict three cats playing keyboards
6 and a moon.
7

8 NINTH DEFENSE

9 Plaintiff's copyright claim is barred because Plaintiff abandoned his
10 copyright.
11

12 TENTH DEFENSE

13 Plaintiff's asserted copyright registration is invalid because Plaintiff
14 abandoned any copyright in the asserted audiovisual work prior to obtaining the
15 asserted copyright registration, and he was (and still is) therefore not a valid
16 copyright owner in the asserted audiovisual work and not a proper copyright
17 claimant for purposes of procuring a federal copyright registration. Plaintiff's
18 knowing failure to advise the United States Copyright Office, in an application for
19 copyright registration of the asserted audiovisual work, of material facts which
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1 might have led to the rejection of a registration application constitutes grounds for
2 holding the registration invalid and incapable of supporting an infringement action.
3

4 ELEVENTH DEFENSE

5 Plaintiff's asserted copyright is unenforceable.

6 TWELTH DEFENSE

7
8 skinnyCorp's portrayal of the "Three Keyboard Cat Moon" design is a fair
9 use.

10 THIRTEENTH DEFENSE

11
12 skinnyCorp's "Three Keyboard Cat Moon" design is not substantially
13 similar to Plaintiff's so-called "Keyboard Cat" audio-visual work.

14 FOURTEENTH DEFENSE

15
16 Plaintiff's claims are barred by the doctrines of laches.

17 FIFTEENTH DEFENSE

18
19 Plaintiff's claims are barred by the doctrines of implied license, consent,
20 estoppel, waiver, and/or acquiescence because Plaintiff, directly and/or through a
21 representative or agent, engaged in conduct from which skinnyCorp properly
22

1 inferred that the alleged copyright owner and creator of “Play Him Off, Keyboard
2 Cat” consented to skinnyCorp’s use of the design referred to as “Three Keyboard
3 Cat Moon.” Schmidt’s co-licensee of the Hot Topic tee-shirt, Brad O’Farrell, was
4 aware that skinnyCorp offered the tee-shirt referred to as “Three Keyboard Cat
5 Moon,” and expressly stated to skinnyCorp that the decision whether or not to “do
6 something” about “Three Keyboard Cat Moon” was “entirely up to” him, that he
7 would not “do anything because Three Keyboard Cat Moon is awesome,” that
8 skinnyCorp has “a pretty solid ground to stand on with it being a parody,” and that
9 he was “Threatless.” O’Farrell asked only that skinnyCorp link to the tee-shirt
10 sold by Hot Topic “somewhere on the Three Keyboard Cat Moon page” on the
11 threadless.com website, where the tee-shirt would continue to be offered for sale
12 by skinnyCorp. Following O’Farrell’s express consent to the “Three Keyboard Cat
13 Moon” tee-shirt, Plaintiff did not object to the “Three Keyboard Cat Moon” shirt
14 for well over a year, during which time skinnyCorp reasonably relied upon the
15 prior express consent it had received to continue to sell the “Three Keyboard Cat
16 Moon” design.
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1 SIXTEENTH DEFENSE

2 Plaintiff's claims are barred to the extent that he forfeited or abandoned his
3
4 purported intellectual property.

5 SEVENTEENTH DEFENSE

6 To the extent the Court finds infringement, such infringement was innocent.
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9 skinnyCorp reserves its right to amend its Answer and Defenses with any
10 further response or defense it may discover over the course of this litigation as
11
12 further information is obtained.

13 WHEREFORE, skinnyCorp requests judgment as follows:
14

- 15 (a) That the Amended Complaint be dismissed in its entirety with
16 prejudice and judgment be entered in favor of skinnyCorp;
17
18 (b) Award skinnyCorp its reasonable attorney's fees, costs and
19 disbursements;
20
21 (c) Award skinnyCorp such other and further relief the Court deems just,
22 equitable, and proper.

JURY DEMAND

skinnyCorp respectfully demands trial by jury of all issues so triable in this matter.

SKINNYCORP'S COUNTERCLAIMS

Defendant skinnyCorp., LLC (“skinnyCorp”), by its undersigned attorneys, asserts these Counterclaims against Plaintiff Charles Schmidt (“Schmidt” or “Plaintiff”) as follows:

NATURE OF THE ACTION

1. skinnyCorp seeks declaratory judgments that Schmidt does not own the copyright or trademark rights alleged in the Amended Complaint and seeks an order cancelling Schmidt's ill-gotten federal trademark registration for the widely used term "Keyboard Cat." Schmidt claims to own an exclusive copyright in a video and exclusive trademark rights in the term "Keyboard Cat," yet both this video and term are in widespread uncontrolled use by countless people. The cat, so to speak, is out of the bag, as Schmidt has permitted, and indeed encouraged, hundreds if not thousands of people to copy his alleged proprietary video, to create derivative works that include this video, and to use the term "Keyboard Cat." All of this activity occurs without any control exercised by Schmidt. Schmidt does not possess the requisite intellectual property rights to prevent skinnyCorp from selling

1 the design it has been selling for over two years, under the name “Three Keyboard
2 Cat Moon.”
3

4 PARTIES

5 2. Defendant and counterclaim-plaintiff skinnyCorp is a Delaware
6 limited liability company with its principal place of business at 1260 W. Madison
7 Street, Chicago, Illinois 60607.
8

9 3. Upon information and belief, Schmidt is an individual residing in
10 Spokane, Spokane County, in the state of Washington.
11

12 JURISDICTION AND VENUE

13 4. skinnyCorp’s counterclaims arise under the Declaratory Judgment
14 Act, 28 U.S.C. §§ 2201, 2202, 28 U.S.C. §§ 1331, 1332, and 1338, 15 U.S.C. §
15 1121, and 15 U.S.C. § 1119 under which the Court may determine the right to a
16 trademark registration and otherwise rectify the trademark register with respect to
17 the registration of any party to the action.
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7. Venue in this District is proper pursuant to 28 U.S.C. §§ 1391(a) and (b).

The “Cool Cat” Audiovisual Work

32

ANSWER TO AMENDED COMPLAINT AND
COUNTERCLAIMS

11. Upon information and belief, the Cool Cat video sat in relative obscurity on YouTube for approximately two years after its initial upload on or around June 7, 2007.

12. Upon information and belief, in or around January or February 2009, an individual named Brad O'Farrell obtained Schmidt's permission to reuse the Cool Cat video.

13. Upon information and belief, in or around February 2009, O’Farrell appended an excerpt of the Cool Cat video (hereinafter referred to as the “Cool Cat

1 excerpt”), to a pre-existing “blooper” video, and thereby created a new “mashup”
2 video, which O’Farrell titled “Play Him Off, Keyboard Cat.”
3

4 14. Upon information and belief, O’Farrell published the very first video
5 titled “Play Him Off, Keyboard Cat” on YouTube on or around February 2, 2009.
6

7 15. A “mashup” is defined as a combination of different works. In this
8 case, O’Farrell’s mashup video titled “Play Him Off, Keyboard Cat” is a
9 combination of two videos, namely, the Cool Cat excerpt and another pre-existing
10 video in O’Farrell’s possession that, upon information and belief, involved a
11 wheelchair on an escalator.
12

13 16. Upon information and belief, O’Farrell’s use of the Cool Cat excerpt
14 at the end of a blooper video was intended to “play” the person shown in the
15 blooper video offstage after a mistake or gaffe. The presence of the Cool Cat
16 excerpt at the end of a blooper video has been compared to actors “getting the
17 hook” as they were pulled offstage in the vaudeville era of theatre.
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17. Upon information and belief, O’Farrell conceived of, adopted, and first used the title “Play Him Off, Keyboard Cat.”

18. O'Farrell claims on his website, located at bradofarrell.com, that in 2009, he "made a video called Play Him Off Keyboard Cat." Annexed hereto as Exhibit B is a true and correct copy of a webpage from O'Farrell's website located at www.bradofarrell.com.

19. Upon information and belief, the term “Keyboard Cat” had not been used by Schmidt or anyone else to identify the Cool Cat video prior to O’Farrell’s adoption and first use of the title “Play Him Off, Keyboard Cat.”

20. Upon information and belief, Schmidt did not conceive of the title “Play Him Off, Keyboard Cat.”

21. Upon information and belief, Schmidt was not the first person to use the title “Play Him Off, Keyboard Cat.”

22. On or around May 15, 2009, O’Farrell was interviewed by a reporter for the website RocketBoom. The interview, which was recorded on video and can be seen on YouTube is titled, “Keyboard Cat: An interview with Brad O’Farrell.”

1 In the interview, O'Farrell explains that "Play Him Off, Keyboard Cat" is a "fail"
2 video and when someone "fails the cat will play the keyboard and it sort of
3 highlights the absurdity of the video." Annexed hereto as Exhibit C is a true and
4 correct copy of a webpage where this interview may be viewed.
5

6 23. Upon information and belief, in or around January or February 2009,
7 O'Farrell requested that Schmidt allow anyone to use the Cool Cat video with or
8 without permission so that the public could freely use the Cool Cat video to create
9 derivative works, such as a mashup video like that created by O'Farrell. Upon
10 information and belief, Schmidt agreed to O'Farrell's request.
11

12
13 Schmidt's Encouragement Of Third Party Use Of The Cool Cat Video Leads To
14 Widespread Uncontrolled Use And Abandonment Of Schmidt's
15 Copyright In The Cool Cat Video

16 24. Appending the Cool Cat excerpt to a blooper video became a
17 widespread Internet fad adopted by thousands of individuals creating their own
18 video mashups, with such videos usually titled "Play Him Off, Keyboard Cat" or a
19 variant thereof.
20

1 25. Such widespread third party use of the Cool Cat video, and/or of the
2 Cool Cat excerpt is consistent with and is a result of Schmidt's agreement that any
3 third party could use the Cool Cat video with or without Schmidt's permission.
4

5 26. O'Farrell states on his website that "[i]n 2009 I made a video called
6 Play Him Off Keyboard Cat that got parodied thousands of times." See Exhibit B.
7

8 27. On April 10, 2009, the website Urlesque.com published an article
9 titled "Breaking: Play Him Off, Keyboard Cat Is Our New Obsession" in which
10 O'Farrell is interviewed. The article states that the "meme got its start from the
11 following video uploaded by YouTuber and fellow Internetter, Brad O'Farrell."
12 Annexed hereto as Exhibit D is a true and correct copy of this article from
13 www.urlesque.com.
14
15

16 28. In the May, 2009 interview with RocketBoom, O'Farrell stated that
17 there were 900 different versions of the "Play Him Off, Keyboard Cat" video on
18 the Internet. See Exhibit C.
19

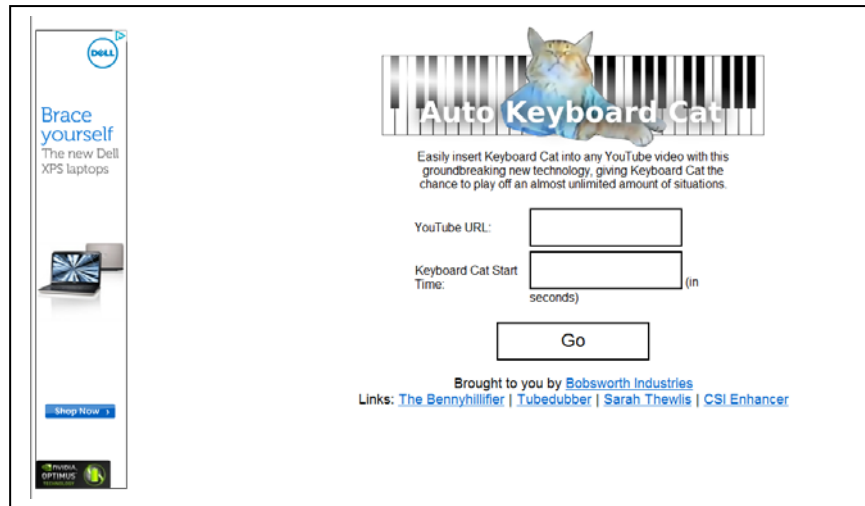
20 29. On May 8, 2009, *Entertainment Weekly* published an article online
21 titled "Play him off, Keyboard Cat! And other fun videos from the week that
22

1 was....” The article states, “Ah, another good week of Internet videos. My favorite
2 — and it might be a reigning favorite for some time to come — was the dawn of
3 DIY keyboard cat. Now you can make any YouTube video part of the most
4 excellent meme of ‘play him off, keyboard cat.’ Here’s the one I made.” The
5 article, which displays the Cool Cat video, contains no notice attributing copyright
6 or trademark ownership to Schmidt. Annexed hereto as Exhibit E is a true and
7 correct copy of this article from the popwatch.ew.com website.
8

9
10 30. The phrase “DIY keyboard cat” (a/k/a/ do it yourself keyboard cat) in
11 the *Entertainment Weekly* article links to a website located at
12 <http://bobsworthindustries.com/keyboardcat/> (the “DIY keyboard cat website”).
13

14 31. The DIY keyboard cat website provides an “Auto Keyboard Cat”
15 video maker that enables any user to make their own mashup video with the Cool
16 Cat excerpt. This website boasts that Internet users can “[e]asily insert Keyboard
17 Cat into any YouTube video with this groundbreaking new technology, giving
18 Keyboard Cat the chance to play off an almost unlimited amount of situations.”
19 The DIY keyboard cat website displays advertisements and indicates that it is
20
21
22

1 “[b]rought to you by Bobsworth Industries.” A true and correct screen capture of
 2 the webpage located at <http://bobsworthindustries.com/keyboardcat/> is shown
 3 below and annexed hereto as Exhibit F is a true and correct copy of this webpage.
 4



14 32. Upon information and belief, the DIY keyboard cat website, is not
 15 affiliated with or licensed by Schmidt. The website contains no notice attributing
 16 authorship, copyright ownership, or trademark ownership to Schmidt.
 17

18 33. On May 11, 2009, *Time* magazine published an online article titled
 19 “Play Him Off, Keyboard Cat” (the “*Time* article”). The *Time* article displays a
 20 still image of the Cool Cat video. There is no notice attributing authorship or
 21
 22

1 ownership in the Cool Cat video to Schmidt. The *Time* article states that
2 “[s]uddenly, keyboard cat started popping up all over YouTube. People attached
3 the cat to the end of already popular videos... Someone even started a website that
4 would attach the keyboard cat to a video of one’s choosing. The musical feline
5 had become a star... People made requests and submitted their own mash-ups.
6
7 Play Him Off, Keyboard Cat is barely a month old, but it already has over 30
8 videos and gets about 20,000 hits a day.” Annexed hereto as Exhibit G is a true
9 and correct copy of this article.
10
11

12 34. On May 15, 2009, *The Los Angeles Times* published an article about
13 O’Farrell titled, “Social Status: The guy who spread Keyboard Cat fever.” The
14 article explains the origin of keyboard cat as follows:
15

16 [i]t wasn't until Brad O’Farrell, a 22-year-old from New York City, grafted
17 an abbreviated version of the cat video onto the end of a distressing clip of a
18 person in a wheelchair tumbling down an escalator that the meme really
19 began to catch on. The meme got its start in February, when O’Farrell saw
20 the potential in Keyboard Cat, and asked Schmidt for permission to use the
21 clip. O’Farrell did a quick mashup and slapped ads on his video, called “Play
22 him off, keyboard cat.” It has made about \$500 -- his highest-grossing
video, he said in an instant message. The majority of that has been racked
up only in the last few weeks. Not bad for a 44-second clip. Since then,
Keyboard Cat has been mashed up more than 200 times, and received an

1 endorsement from Ashton Kutcher, which was broadcast to more than 1
2 million people via Twitter.

3 Annexed hereto as Exhibit H is a true and correct copy of this article.

4 35. On May 16, 2009 *The Guardian* published an article online titled
5 “Internet review: Play Him Off, Keyboard Cat.” The article states that the Cool
6 Cat excerpt has “been appended to countless blooper videos, as if to ‘play’ the
7 hapless fools offstage after their guffaws.” The article does not attribute
8 authorship or ownership of the Cool Cat video to Schmidt. Annexed hereto as
9 Exhibit I is a true and correct copy of this article.
10
11

12 36. On May 18, 2009, the Cool Cat excerpt was shown on the television
13 show *The Daily Show*. Upon information and belief there is no notice attributing
14 authorship or ownership in the Cool Cat video to Schmidt by *The Daily Show*.
15

16 37. On May 26, 2009, a work derivative of the Cool Cat video was shown
17 on the television show *The Colbert Report* to “play” Colbert offstage after he fell
18 in front of a live studio audience. On the show, the band Green Day acts out the
19 Cool Cat video as the lead singer’s hands are moved by his band members to make
20
21 it appear as if he is playing a keyboard. The clip is titled “The Colbert Report:
22

1 Exclusive – Play Him Off, Keyboard Cat.” Annexed hereto as Exhibit J, is a true
2 and correct copy of the webpage where this video can be viewed.
3

4 38. In May 2009, Totally Sketch, a maker of comedic videos, published a
5 video on YouTube titled “Keyboard Cat: True Internet Story.” This video provides
6 a “faux” biographical history of the keyboard cat. The term “Keyboard Cat” is
7 displayed in this video. The Cool Cat excerpt is displayed in this video. There is
8 no notice attributing authorship, copyright ownership, or trademark ownership to
9 Schmidt in this video.
10

11
12 39. On or around June 4, 2009 Kato Kaelin created a video titled
13 “Keyboard Kato” for an episode of the television series titled “Tosh,” which airs on
14 the television station Comedy Central. The term “Kato Kaelin Keyboard Cat” is
15 displayed in connection with this video. There is no notice attributing authorship,
16 copyright ownership, or trademark ownership to Schmidt in this video. Annexed
17 hereto as Exhibit K is a true and correct copy of the webpage that displays this
18 video.
19
20
21
22

1 40. In or around June or July 2009, an individual artist named Jude
2 Buffum created a video titled “Play Mario Off, Keyboard Cat,” which depicts the
3 keyboard cat as an “8-bit figure.” The organ music heard in the Cool Cat video
4 was re-composed for Buffum’s video as an 8-bit tune by micromusician Doctor
5 Octoroc. The video is displayed on YouTube and on the website Game Set Watch.
6 The term “Keyboard Cat” is displayed in connection with this video. The artist
7 also created a tee-shirt, which is currently offered for sale. See Paragraph 60 and
8 Exhibit P below. There is no notice attributing authorship, copyright ownership, or
9 trademark ownership to Schmidt in this video. Annexed hereto as Exhibit L is a
10 true and correct copy of a webpage that displays this video.
11

12 41. On or around June 1, 2010, mobile videogame maker Gameloft
13 announced its remake of the videogame titled “Earthworm Jim.” The revamped
14 video game features new characters such as “a keyboard-playing cat.” Upon
15 information and belief, Schmidt did not license to Gameloft the right to create
16 works derivative of his Cool Cat video. Annexed hereto as Exhibit M is a true and
17 correct copy of a webpage discussing this game.
18
19
20
21
22

1 42. In or around December 2010, videogame maker Activision Blizzard
2 announced its new videogame “World of Warcraft: Cataclysm.” Artwork for the
3 videogame revealed the game’s antagonist, Deathwing, playing a keyboard with
4 the text “Keyboard Cataclysm: Play ‘em Off, Deathwing.” Upon information and
5 belief, Schmidt did not license to Gameloft the right to create works derivative of
6 his Cool Cat video. Upon information and belief, there is no notice attributing
7 authorship, copyright ownership, or trademark ownership to Schmidt on this
8 artwork or in the videogame. Annexed hereto as Exhibit N is a true and correct
9 copy of the artwork that is displayed on the World of Warcraft website.
10
11

12
13 Schmidt’s Actions Demonstrate His Intent To Relinquish Copyright
14 In The Cool Cat Video To The Public Domain

15 43. Upon information and belief, Schmidt operates a website located at
16 <http://playhimoffkeyboardcat.com> (the “Schmidt Website”).
17

18 44. On the Schmidt Website, Schmidt invites people to submit “any
19 videos or links featuring Keyboard Cat to the OFFICIAL home of Keyboard Cat!
20 If Keyboard Cat likes it, your video will be added to the blog!” Annexed hereto
21 as Exhibit O is a true and correct copy of webpages from the Schmidt Website.
22

47. On the Schmidt Website, Schmidt requires users who submit videos that include the Cool Cat video to accept the “Terms of Submission,” which require the users to represent and warrant that the user “own[s] all rights to the content submitted,” as shown below:

1. You have permission to post this.

2. This site may distribute this post.

See Terms of Submission from the Schmidt Website in Exhibit O.

54. To the extent Schmidt owned a copyright in the Cool Cat video, Schmidt's agreement that third parties can freely use the Cool Cat video without permission, and his overt public acts of encouraging third parties to copy, display, adapt, and/or distribute the Cool Cat video indicate an intention to abandon that copyright.

55. Given that Schmidt overtly encourages the public to freely copy and distribute the Cool Cat video and make works derivative thereto, Schmidt abandoned his exclusive right to do the same.

56. Third party use, copying, display, adaptation, and distribution of the Cool Cat video is so widespread that a search on YouTube for “keyboard cat” yields over 20,000 results.

57. The YouTube website contains videos that include excerpts of the Cool Cat video that have not been licensed by Schmidt.

58. The YouTube website contains videos that include and/or constitute works derivative of the Cool Cat video that have not been licensed by Schmidt.

The Term “Keyboard Cat” Is Widely Used By Third Parties Without
License or Control by Schmidt

59. After the initial adoption and use by O’Farrell, the phrase “Play Him Off Keyboard Cat” was adopted and used by third parties copying the Cool Cat excerpt and/or the Cool Cat video.

60. Third parties manufacture and sell products, including apparel, that are identified by or include the term “Keyboard Cat” and/or display depictions of the Cool Cat video, examples of which are shown below and annexed hereto as Exhibit P.



← Super Keyboard Cat Bros. Lincoln 200 Exhibition →
8-Bit Keyboard Cat T-Shirt
June 23, 2009

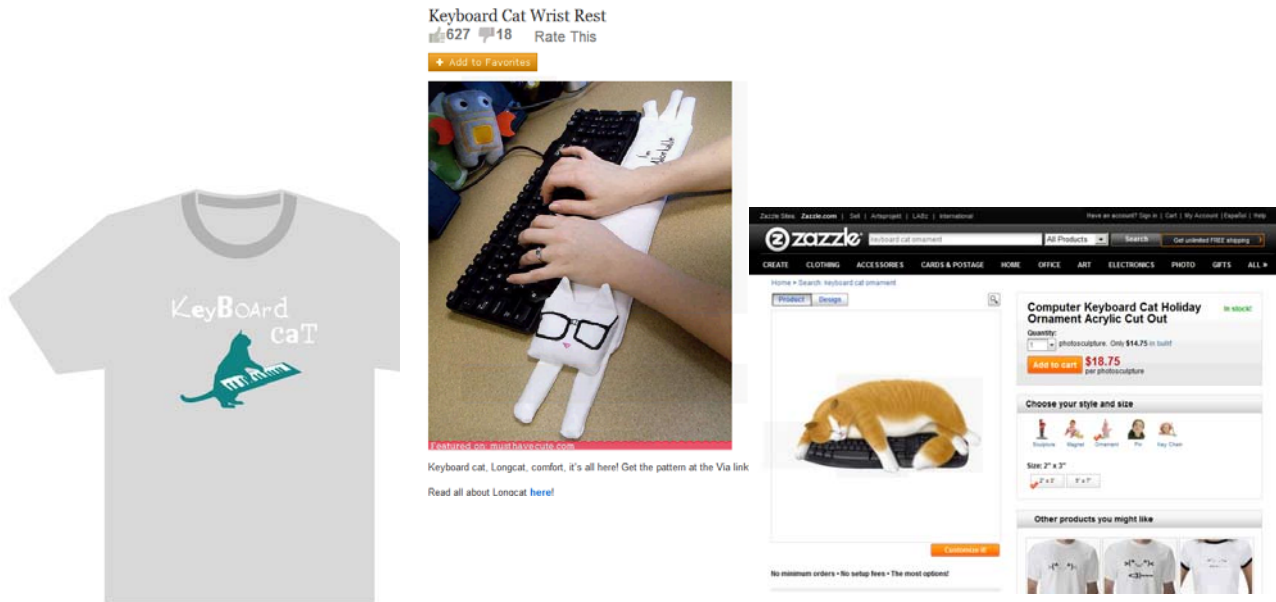


After a recent fiasco with someone selling products featuring my Keyboard Cat illustration (they've since taken down the products and offered monetary compensation) and numerous requests on my Youtube page for a T-Shirt, I've set up a shop at MySoti where you can purchase a shirt of my design.

64. Upon information and belief, Schmidt did not license the use of the term “Keyboard Cat” for use in connection with “The Great American Keyboard Cat Competition,” nor did Schmidt license the right to create works derivative of the Cool Cat video to the artists the submitted works in the competition.

The Term “Keyboard Cat” Is Used By Third Parties To Describe Products That Feature A Keyboard-And A Cat

65. Third parties unrelated to Schmidt use the words “Keyboard Cat” to describe products, including apparel, that feature a cat and a keyboard, examples of which are shown below and annexed hereto as Exhibit Q.



68. The term “Keyboard Cat” is part of common parlance. The term is defined in the Urban Dictionary as an “[a]n awesome cat with the ability to play the keyboard. Often put at the end of a video of someone failing at something and getting hurt; with the title “play him/her off, keyboard cat.” Annexed hereto as Exhibit R is a true and correct copy of the definition of “Keyboard Cat” from www.urbandictionary.com.

69. On or around July 16, 2009 two individual designers referred to as “Oxen” submitted a design titled “Three Keyboard Cat Moon” to threadless.com, an Internet retail website owned and operated by skinnyCorp.

70. Threadless.com is a user participation-based website where individuals submit designs that are reviewed and scored by the threadless.com

community. Highly rated designs may be selected by skinnyCorp for sale as a “Threadless tee” via threadless.com.

71. The “Three Keyboard Cat Moon” design is a tribute to two well-known Internet fads: the “Play Him Off, Keyboard Cat” video first created by O’Farrell as a mashup incorporating Schmidt’s Cool Cat video, and the “Three Wolf Moon” tee-shirt design that depicts three wolves howling at the moon, which is sold via Amazon.com and became popular as a result of a customer’s comedic written review of the tee-shirt. The “Three Wolf Moon” tee-shirt is shown on the left, and the “Three Keyboard Cat Moon” tee-shirt sold by skinnyCorp is shown on the right:



77. The “Three Keyboard Cat Moon” tee-shirt is no longer sold by skinnyCorp.

Schmidt Improperly Obtains Federal Registrations Despite His Lack Of Intellectual Property Rights In The Cool Cat Video And Alleged “Keyboard Cat” Mark

78. Well after Schmidt’s agreement that anyone could use the Cool Cat video without his permission, the proliferation of third party copying of the Cool Cat video, and skinnyCorp’s sale of products displaying the “Three Keyboard Cat Moon” design, Schmidt filed an application to register the copyright in the Cool Cat video with the United States Copyright Office on September 22, 2010.

79. On September 22, 2010, Schmidt had already abandoned his copyright in the Cool Cat video.

80. Well after O’Farrell’s adoption and use of the phrase “Play Him Off, Keyboard Cat,” and the proliferation of third party use of the term “Keyboard Cat” in connection with videos and other goods and services, Schmidt filed an application with the United States Patent and Trademark Office to register the term “Keyboard Cat” as a trademark on August 19, 2010.

1 true.

2 (Emphasis added; hereinafter, the “Declaration.”) A true and correct copy of
3
4 Schmidt’s trademark application, which includes this Declaration, is annexed
5 hereto as Exhibit T.

6 85. Schmidt made false material representations of fact to the United
7
8 States Patent and Trademark Office in connection with his application for the
9 asserted registration of “Keyboard Cat,” which he knew to be false and/or
10 misleading.

11
12 86. When Schmidt executed the Declaration, on August 19, 2010,
13 Schmidt knew of O’Farrell’s prior adoption and use of the term “Keyboard Cat” in
14 commerce.

15
16 87. When Schmidt executed the Declaration, on August 19, 2010,
17 Schmidt knew that third parties were using the term “Keyboard Cat” in commerce.
18 Schmidt’s awareness of such uses, and his acquiescence to the same, is evident
19 from the Schmidt Website, a portion of which is an archive maintained by Schmidt
20 of keyboard cat-related works, including uses of the term “Keyboard Cat” that
21
22

1 commenced as early as April 2009 – over one year prior to Schmidt’s execution of
2 the Declaration. *See Exhibit O.*

3
4 88. Further evidence showing Schmidt’s knowledge of third party use of
5 the alleged mark “Keyboard Cat” is likely to be obtained after a reasonable
6 opportunity for discovery or investigation.

7
8 89. Schmidt’s execution of the Declaration was made with reckless
9 disregard of its true or falsity.

10 90. Alleged herein are sufficient facts from which the Court may
11 reasonably infer that Schmidt acted with an intent to deceive the United States
12 Patent and Trademark Office.

13
14 91. Schmidt committed fraud during the prosecution of his application for
15 the asserted registration by attesting that “no other person, firm, corporation, or
16 association has the right to use the above identified mark in commerce” when, at
17 the time he signed the Declaration, Schmidt knew that the statement was false
18 inasmuch as Schmidt knew at the time he filed his Declaration that others were
19 using the term “Keyboard Cat” in commerce.
20
21
22

92. In filing his federal trademark application for the term “Keyboard Cat,” Schmidt declared that he was using the alleged “Keyboard Cat” mark on all of the goods and services identified in the application, and that such use began at least as early as 1986.

93. Upon and information belief, as of the filing date of his federal trademark application for the term “Keyboard Cat,” Schmidt was not using the alleged “Keyboard Cat” mark on all of the goods identified in the application.

94. Upon and information belief, as of the filing date of his federal trademark application for the term “Keyboard Cat,” Schmidt was not using the alleged “Keyboard Cat” mark on belts, which are identified in his trademark application.

95. Upon and information belief, upon the filing of his federal trademark application for the term “Keyboard Cat,” Schmidt falsely represented to the United States Patent and Trademark Office that he was using the term “Keyboard Cat” as a trademark in interstate commerce in connection with all the goods and services identified in the application when that was not the case.

1 96. The federal trademark application filed by Schmidt with the United
2 States Patent and Trademark Office on August 19, 2010, to register the alleged
3 mark “Keyboard Cat” matured to a federal trademark registration on April 26,
4 2011 under Registration No. 3,950,558 and has been asserted in this action against
5 skinnyCorp (the “Asserted Trademark Registration”).
6

7
8 **SKINNYCORP’S CLAIMS FOR RELIEF**

9 **COUNT I**

10 **Declaratory Judgment That Schmidt’s Alleged “Keyboard Cat” Mark Is Not A**
11 **Valid, Protectable, Or Registerable Trademark Or Service Mark**

12 *Schmidt Abandoned Any Rights He May Have Had In The*
13 *Alleged “Keyboard Cat” Mark*

14 97. skinnyCorp incorporates and realleges the allegations contained in
15 paragraphs 1- 96 of its Counterclaims as though fully set forth herein.

16 98. The term “Keyboard Cat” is in widespread use by third parties.

17
18 99. Schmidt does not use the term “Keyboard Cat” exclusively in
19 interstate commerce.

20 100. The term “Keyboard Cat” is commonly used by third parties and by
21 Schmidt to describe a “blooper” video that has appended to it, the Cool Cat
22

1 excerpt. Such videos have become viral on the Internet and are commonly titled
2 “Play Him Off, Keyboard Cat.” Schmidt does not license the use of the term
3 “Keyboard Cat” in connection with all such videos.
4

5 101. Schmidt does not license the use of the term “Keyboard Cat” in
6 connection with all goods and services offered by third parties under or in
7 connection with such term.
8

9 102. Schmidt does not control the quality of the goods and services offered
10 by all third parties under or in connection with the term “Keyboard Cat.”
11

12 103. Schmidt allows and encourages uncontrolled, widespread, third party
13 use of the term “Keyboard Cat.” As a result, Schmidt has abandoned any
14 trademark rights in the term “Keyboard Cat,” to the extent he ever owned any
15 trademark rights in the term “Keyboard Cat.”
16

17 Schmidt’s Alleged “Keyboard Cat” Mark Is Merely Descriptive
18

19 104. The alleged mark “Keyboard Cat” is generic for, or at best merely
20 describes, products and services sold under and rendered in connection with an
21 image of a cat playing a keyboard.
22

105. The generic or descriptive term “Keyboard Cat” does not identify a single source of goods and services.

106. There is no mental association between the words “Keyboard Cat” and Schmidt.

107. The alleged mark “Keyboard Cat” has not acquired distinctiveness or secondary meaning as to Schmidt.

108. The alleged mark “Keyboard Cat” is not protectable or a registrable trademark or service mark.

109. skinnyCorp is damaged by Schmidt’s claim of exclusive rights in the words “keyboard cat.”

110. Schmidt does not have any legitimate trademark rights in the alleged mark “Keyboard Cat.” By virtue of the commencement of this action by Schmidt, a controversy exists between the parties to this action that warrants the Court to declare whether Schmidt owns the trademark right he alleges.

COUNT II

**Declaratory Judgment That Schmidt Committed Fraud On
The United States Patent And Trademark Office**

111. skinnyCorp incorporates and realleges the allegations contained in paragraphs 1- 110 of its Counterclaims as though fully set forth herein.

112. Schmidt made false material representations of fact to the United States Patent and Trademark Office in connection with his application for the Asserted Trademark Registration, which he knew to be false and/or misleading.

113. When Schmidt executed the Declaration, on August 19, 2010, Schmidt knew of O'Farrell's prior use of the term "Keyboard Cat" in commerce, and of third-party uses of the term in commerce.

114. Schmidt committed fraud during the prosecution of his application for the Asserted Trademark Registration by attesting that "no other person, firm, corporation, or association has the right to use the above identified mark in commerce" when, at the time he signed the Declaration, Schmidt knew that the statement was false inasmuch as Schmidt knew at the time he filed his Declaration that others were using the term "Keyboard Cat" in commerce.

1 115. By virtue of the commencement of this action by Schmidt, a
2 controversy exists between the parties to this action that warrants the Court to
3
4 declare whether Schmidt owns the federal trademark registration he alleges and
5 whether Schmidt committed fraud on the United States Patent and Trademark
6 Office in his procurement of the Asserted Trademark Registration.
7

8 **COUNT III**

9 **Cancellation Of Schmidt's Asserted Federal Trademark Registration**

10 116. skinnyCorp incorporates and realleges the allegations contained in
11 paragraphs 1- 115 of its Counterclaims as though fully set forth herein.
12

13 **Schmidt's Alleged "Keyboard Cat" Mark Is Merely Descriptive**

14 117. As set forth above, the alleged mark "Keyboard Cat" that is the
15 subject of the Asserted Trademark Registration, is generic, or at best merely
16 descriptive, and therefore not protectable as a trademark inasmuch as the term
17 "Keyboard Cat" describes goods and service that show a keyboard and a cat, and
18 does not exclusively identify Plaintiff as the source of any goods or services.
19
20
21
22

Schmidt Abandoned Any Rights He May Have Had In The
Alleged “Keyboard Cat” Mark

118. As set forth above, to the extent Plaintiff ever owned trademark rights in the purported “Keyboard Cat” mark that is the subject of the Asserted Trademark Registration, such rights have been abandoned due to uncontrolled widespread third-party use and/or uncontrolled licensing of the term “Keyboard Cat.”

Schmidt Committed Fraud On The United States Patent & Trademark Office

119. As set forth above, Plaintiff acted fraudulently in obtaining the Asserted Trademark Registration by knowingly making a materially false representation to the United States Patent and Trademark Office in the procurement of the Asserted Trademark Registration.”

120. skinnyCorp is damaged by Asserted Trademark Registration because such registration gives color of exclusive statutory rights to Schmidt when in fact Schmidt does not own exclusive rights in the alleged mark “Keyboard Cat.”

121. Given that the term “Keyboard Cat” is not a protectable trademark and that Schmidt acted fraudulently in obtaining the Asserted Trademark

1 Registration, Registration No. 3,950,558 should be cancelled pursuant to the
2 Lanham Act, 15 U.S.C. §§1052(e), 1064(3), and 1119.
3

4 **COUNT IV**
5 **Declaratory Judgment That Schmidt Has Abandoned His Copyright In The**
6 **Cool Cat Video**

7 122. skinnyCorp incorporates and realleges the allegations contained in
8 paragraphs 1- 121 of its Counterclaims as though fully set forth herein.

9 123. Schmidt encourages and permits third party use of the Cool Cat video,
10 or a portion thereof, without restriction.
11

12 124. Schmidt encourages and permits third party use of the Cool Cat video,
13 or a portion thereof, without license.

14 125. Schmidt intended for third parties to use, copy, display, and/or
15 distribute the Cool Cat video, or a portion thereof, without restriction.
16

17 126. Schmidt intended for third parties to use, copy, display, and/or
18 distribute the Cool Cat video, or a portion thereof, without license.
19

20 127. Third parties use, copy, display, and/or distribute the Cool Cat video,
21 or a portion thereof, without restriction.
22

130. To the extent Schmidt owned a copyright in the Cool Cat video, Schmidt's agreement that third parties can use the Cool Cat video without permission, and his overt public acts of encouraging third parties to use, copy, display, and/or distribute the Cool Cat video without restriction indicate an intention to abandon that copyright.

131. Given that Schmidt overtly encourages the public to freely use, copy, display, and/or distribute the Cool Cat video, a portion thereof, and works derivative thereto, Schmidt abandoned his exclusive right to do the same.

132. Schmidt does not have any legitimate copyright ownership in the alleged Cool Cat video. By virtue of the commencement of this action by Schmidt, a controversy exists between the parties to this action that warrants the Court to declare whether Schmidt can validly claim copyright ownership in the Cool Cat video.

1 skinnyCorp reserves its right to amend its Counterclaims with any further
2 allegations it may discover over the course of this litigation as further information
3 is obtained.
4

5
6 **PRAYER FOR RELIEF**
7

8 WHEREFORE, skinnyCorp requests judgment as follows:
9

- 10 1. A declaration that Schmidt does not own trademark rights in the term
11 “Keyboard Cat;”
12
13 2. A declaration that Schmidt committed fraud on the United States Patent
14 and Trademark Office;
15
16 3. An order cancelling the Asserted Trademark Registration, Registration No.
17 3,950,558 for the term “Keyboard Cat;”
18
19 4. A declaration that Schmidt abandoned his copyright in the Cool Cat Video;
20
21 5. An award to skinnyCorp of its attorneys’ fees and costs; and
22
23 6. An award to skinnyCorp of such other and further relief as the Court may
24 deem just and equitable.
25
26
27
28

JURY DEMAND

skinnyCorp demands trial by jury of all issues so triable in this matter.

1 Dated: August 1, 2011

Respectfully submitted,

2 By: s/ Michael R. Scott

3 MICHAEL R. SCOTT, WSBA #12822

4 Attorneys for the Defendant

5 Hillis Clark Martin & Peterson P.S.

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7 Seattle WA 98101-2925

8 Telephone: (206) 623-1745

9 Facsimile: (206) 623-7789

10 Email: mrs@hcmp.com

11 JOEL D. LEVITON (Application to Appear pro hac
12 vice Pending)

13 Fish & Richardson P.C.

14 60 South Sixth Street, Suite 3200

15 Minneapolis, MN 55402

16 Telephone: (612) 335-5070

17 Facsimile: (612) 288-9696

18 Email: leviton@fr.com

19 KRISTEN MCCALLION (Application to Appear pro
20 hac vice Pending)

21 Fish & Richardson P.C.

22 601 Lexington Avenue, 52nd Floor

23 New York, New York 10022-4611

24 Telephone: (212) 765-5070

25 Facsimile: (212) 258-2291

26 Email: mccallion@fr.com

27 Attorneys for Defendant
28 skinnyCorp, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Caitlin A. Bellum, Esq.
Katherine Hendricks, Esq.
Hendricks & Lewis, PLLC
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kh@hllaw.com,zed@hllaw.com

DATED this 1st day of August, 2011 at Seattle, Washington.

By s/ Michael R. Scott

Michael R. Scott, WSBA #12822
Hillis Clark Martin & Peterson P.S.
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70

ANSWER TO AMENDED COMPLAINT AND
COUNTERCLAIMS

Hillis Clark Martin & Peterson P.S.
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Seattle, Washington 98101-2925